Supreme Court, U.S.
FILED
JUN 3 1992
OFFICE OF THE CLERK

(3)

No. 91-1752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL J. WOOD, M.D.,
PETITIONER

v.

MELVIN J. FREEDMAN, M.D., et al.,
RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS CRESCENT COUNTIES FOUNDATION FOR MEDICAL CARE AND THOMAS R. HYNGSTROM IN OPPOSITION

PRISCILLA P. WEAVER
Counsel of Record
KENNETH E. WILE
JAMES R. MAC AYEAL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

FRANK N. GUNDLACH
Armstrong, Teasdale, Schlafly, Davis & Dicus
One Metropolitan Square
St. Louis, Missouri 63102
(314) 621-5070

Attorneys for Respondents Crescent Counties Foundation for Medical Care and Thomas R. Hyngstrom

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

Does 42 U.S.C. § 1320c-6 deprive Medicare Peer Review Organizations (and their agents) of the common law absolute immunity afforded other federal actors when performing prosecutorial functions?

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BRIEF FOR RESPONDENTS CRESCENT COUNTIES FOUNDATION FOR MEDICAL CARE AND THOMAS R. HYNGSTROM IN OPPOSITION

Respondents Crescent Counties Foundation for Medical Care and Thomas R. Hyngstrom respectfully submit this brief in opposition to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The Order of the court of appeals (Pet. App. A1-A5) affirming the decision of the district court is unreported. The Order of the district court dated July 31, 1989 (Pet. App. B1-B8), granting respondents' motion to dismiss for failure to state a claim is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1991. Following an extension of time afforded by the Court, petitioner Russell James Wood filed his petition for certiorari on March 23, 1992, and it was rejected. Wood refiled his petition on May 4, 1992, and it was accepted for filing by the Clerk. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT

1. Nature of the Case. Pursuant to 42 U.S.C. § 1320c-5 and 42 C.F.R. Part 1004, the United States Department of Health and Human Services ("HHS") accepted the recommendation of respondent Crescent Counties Foundation for Medical Care ("CCFMC") that petitioner, a physician, be sanctioned by exclusion from participation in the federal Medicare program for a specified period. Pet. App. B2-B3. Petitioner then brought this action against respondents, who had recommended to the Office of the Inspector General ("OIG") of HHS that petitioner be sanctioned.

Respondents CCFMC and Central Illinois Medical Review Organization ("CIMRO") are Medicare Peer Review Organizations ("PROs") that are empowered under Section 1320c-5(b)(1) to recommend sanctions. Pet. App. B2-B3. Respondents Thomas Hyngstrom and Thomas O'Neill are the executive directors of CCFMC and CIMRO respectively. The remaining respondents are physicians who participated in the peer review of Dr. Wood.

The claims in petitioner's complaint against respondents are by turns scurrilous and incoherent. In his Second Amended Complaint, petitioner alleged that respondents' conduct in recommending charges to OIG violated, *inter alia*, the federal and Missouri antitrust laws, RICO, and the Due Process Clause. He also charged respondents

with common law negligence, libel and slander, tortious interference with contracts, and "WILFUL AND WANTON MISCONDUCT &/or IN FRAUD &/or IN CONSPIRACY &/or IN BAD FAITH &/or MALICIOUSLY &/or 'MANIFEST AND PALPABLE.' " Second Amended Complaint at 27 (App., *infra*, 3a).

The following is characteristic of petitioner's allegations:

> One or more OIG personnel were falsely advised by Defendant Freedman, MD and/or Hyngstrom, PhD, et al that Allegations must remain as substantiated because a One Year Sanction, which implied an admission by Dr. Wood of Medical Practice Misconduct, and although the OIG had read on and dismissed half of the 22 Allegations, the OIG left half in order to sanction the Plaintiff for 1 year (reduced from 5 years because of Review by Peer Reviewers of the 44 reported Allegations to CCFMC) even though the Plaintiff had 3 times on the last Record denied that he had done anything wrong and was not guilty of any Allegation of Medical Practice Misconduct and had 3 times refused a compromise offer of 1 year sanctioning on the Second Sanction Trial Record; . . .

Id. at 9 (App., *infra*, 1a). Elsewhere, petitioner charged respondents with "Permitting a Star Chamber Inquisitorial Proceeding to be conducted by Seven Physicians" (*id.* at 18 (App., *infra*, 2a)), and "Willfully and Wantonly et al Misrepresenting the correct dosages and range of correct dosages and usages of numerous medications . . . ." *Id.* at 29 (App., *infra*, 3a).

The United States District Court for the Southern District of Illinois, relying on the Eighth Circuit's decision in *Kwoun* v. *Southeast Missouri Professional Standards Review Organization*, 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988) (hereinafter *Kwoun*), held that (a) defendants were federal officers, (b) defendants acted as prosecutors in recommending that Dr. Wood be

sanctioned, and (c) defendants were therefore absolutely immune from Dr. Wood's claims.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. At the invitation of the court of appeals, the Department of Justice filed a brief *amicus curiae* to address the potential applicability of the Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), and the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), to petitioner's claims. In its submission, the United States joined in respondents' contention that their actions in recommending sanctions were protected by common law absolute immunity.

In an unpublished Order, the court of appeals affirmed the district court's decision.[1] Pet. App. A1-A2. The majority agreed with the district court that respondents were entitled to the common law absolute immunity afforded to federal officials acting in a prosecutorial capacity. *Id.* at A3. Like *Kwoun*, the majority also concluded that 42 U.S.C. § 1320c-6, which deals with the liability of PROs generally for all of their activities, was not intended to abrogate the common law absolute immunity afforded PROs and other federal officials when they perform prosecutorial duties.[2] *Id.* at A4.

Without mentioning the majority's reliance on common law absolute immunity for prosecutorial functions, petitioner has sought review in this Court of the majority's interpretation of Section 1320c-6. The *only* cases to in-

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[1] On January 16, 1992, the court of appeals denied the joint motion by these respondents and *amicus curiae* United States of America to publish its Order.

[2] In a two-paragraph dissent, Judge Cudahy reiterated the position of the *Kwoun* dissent that Section 1320c-6(b) precludes absolute immunity. *See* Pet. App. A5.

terpret Section 1320c-6, *Kwoun* and the instant case, both determined that Congress did not intend to foreclose PROs and their agents from invoking the absolute immunity available under federal common law to prosecutors. Accordingly, there is no conflict between the circuits that merits this Court's attention.

2. The Duties of Medicare PROs. A "utilization and quality control peer review organization" under 42 U.S.C. § 1320c *et seq.* (1982), consists of a representative group of physicians with different specialties from a given locality.[3] One PRO in each state contracts with the Health Care Financing Administration ("HCFA") of HHS. The state PRO, in turn, subcontracts with PROs located throughout the state to ensure that statutory objectives are fulfilled. In this case, CCFMC is the designated PRO for Illinois. At all times relevant to this action, respondent CIMRO was a sub-contractor PRO based in Champaign, Illinois.

Although the functions of PROs are growing increasingly numerous,[4] PROs have three primary responsibilities in implementing their congressional mission to ensure "the effective, efficient, and economical delivery of health care services." 42 U.S.C. § 1395y(g) (1982). First, PROs review a hospital's participation in the Medicare program to determine whether the hospital's services are medically necessary and allowable. 42 U.S.C. § 1320c-3(a)(1) (1982). To that end, the PRO enters into an agreement that permits the PRO to review "the completeness, adequacy, and quality

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[3] Respondents have cited statutory provisions governing PROs in effect in 1986 when respondents made their sanction recommendation.

[4] When enacted in 1982, 42 U.S.C. § 1320c-3(a), detailing many of the primary functions of a PRO, had 11 sub-parts. The number of sub-parts has now grown to 16. 42 U.S.C.A. § 1320c-3(a) (West 1991).

of care provided" by the hospital. 42 U.S.C. § 1395cc(a)(1)(F) (1982).

Second, PROs determine whether the amounts charged by individual physicians should be paid. 42 U.S.C. § 1320c-3(a)(2) (1982). In making these determinations, the PRO must identify and apply "professionally developed norms of care, diagnosis, and treatment." 42 U.S.C. § 1320c-3(a)(6) (1982). The PRO's determination whether to reimburse a physician's submitted charges is ordinarily conclusive. 42 U.S.C. § 1320c-3(a)(2) (1982).

Finally, as noted, Congress charged PROs with recommending to the OIG that physicians or hospitals be sanctioned for "grossly and flagrantly" violating their statutory obligations to provide appropriate medical care to Medicare beneficiaries. 42 U.S.C. § 1320c-5(b)(1) (1982); 42 C.F.R. § 1004.40.[5] Although not mentioned in the petition, numerous procedural requirements protect the rights of physicians at every stage of the sanctioning process.[6]

First, the PRO may submit a report recommending a sanction only "after reasonable notice and opportunity for discussion with the practitioner or person concerned." 42 U.S.C. § 1320c-5(b)(1) (1982). Upon deciding to recommend a sanction, the PRO submits its report to the OIG, and also sends a copy to the physician with notice that he or she has 30 days to submit additional material to the OIG. 42 C.F.R. § 1004.60; 42 C.F.R. § 1004.70.

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[5] The regulations now codified at 42 C.F.R. § 1004.1, *et seq.*, were originally adopted in 1985, *see* 50 Fed. Reg. 15344-47 (1985), and applied to Wood's sanction proceedings in 1986.

[6] In light of these requirements, the courts have repeatedly upheld the constitutionality of the sanctioning process. *See, e.g., Hilst* v. *Bowen*, 874 F.2d 725, 727-28 (10th Cir. 1989); *Thorbus* v. *Bowen*, 848 F.2d 901, 903-04 (8th Cir. 1988) (citing additional cases).

The OIG then decides, based on the PRO report and material submitted by the physician, whether a sanction is warranted. 42 U.S.C. § 1320c-5 (1982); 42 C.F.R. § 1004.90(b). The OIG must confirm whether:

(1) The PRO is following its procedures;

(2) A violation has occurred; and

(3) The practitioner or other person has demonstrated an unwillingness or lack of ability substantially to comply with an obligation.

42 C.F.R. § 1004.90(b). If the OIG concludes that a sanction is warranted, it imposes a sanction based on the recommendation of the PRO and the guidelines set forth in 42 C.F.R. § 1004.90(d).[7]

The appeals process from the OIG's determination is extensive. The objecting physician is entitled to a hearing before an Administrative Law Judge. 42 C.F.R. § 1004.130 (a)(1). At this hearing, the physician may call witnesses under oath, cross-examine witnesses, submit documents and briefs, and make oral argument. 42 C.F.R. §§ 498.61-498.63. The ALJ's decision is appealable to the Appeals Council. 42 C.F.R. § 498.80. The Appeals Council's decision is the final agency action. If the physician remains dissatisfied, he may appeal the sanction to the district court (with the usual right to appeal to the court of appeals if the physician is dissatisfied with the district court's decision).

In short, a persistent physician can obtain review by (1) the PRO, (2) the OIG, (3) an ALJ, (4) the Appeals

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[7] Ordinarily, the OIG imposes the sanction. *See* 42 C.F.R. § 1004.90(d). If, however, the OIG fails to act on the PRO's recommendation within 120 days after actual receipt of the PRO's report, the sanction recommended by the PRO automatically becomes effective. 42 C.F.R. § 1004.90(e).

Council, (5) a federal district court, and (6) the court of appeals. Neither the statute nor the applicable regulations, however, provide for civil actions against PROs and their agents.

While the foregoing are the three main functions of PROs, a PRO has a number of additional duties. A PRO must review professional activities in the area, 42 U.S.C. § 1320c-3(a)(1) (1982); consult with nurses and other non-physicians who provide health services regarding the PRO's ongoing review responsibilities, 42 U.S.C. § 1320c-3(a)(5) (1982); inspect the facilities of hospitals and physicians whose activities are subject to review, 42 U.S.C. § 1320c-3(a)(7)(D) (1982); and coordinate its activities and disseminate information to agencies responsible for reimbursing physicians and hospitals, 42 U.S.C. § 1320c-3(a)(10)(A) (1982). Except under very limited circumstances, a PRO may not disseminate confidential information regarding the activities of a physician or hospital. 42 U.S.C. § 1320c-9 (1982).

3. **Section 1320c-6.** Petitioner seeks review of the Seventh Circuit's disagreement with his interpretation of the effect of Section 1320c-6(b). This subsection provides:

> **(b) Employees and fiduciaries of organizations having contracts with Secretary**
>
> No person who is employed by, or who has a fiduciary relationship with, any such organization or who furnishes professional services to such organization, shall be held by reason of the performance by him of any duty, function, or activity required or authorized pursuant to this part or to a valid contract entered into under this part, to have violated any criminal law, or to be civilly liable under any law of the United States or of any State (or political subdivision thereof) provided he has exercised due care.

Nothing in Section 1320c-6 generally, or in Subsection 1320c-6(b) specifically, purports to limit the availability of

other common law immunities appropriate to the challenged function. Section 1320c-6 is entitled "Limitation on liability," and its provisions expand (not restrict) available immunity. Subsection 1320c-6(b), by its terms, applies to "*any* duty, function, or activity" of PROs, 42 U.S.C. § 1320c-6(b) (emphasis added), and thus, in many instances, affords immunity where none existed before. Significantly, Section 1320c-6(b) makes no specific reference to the prosecutorial duties of PROs and their agents.

Nor does the legislative history indicate in any way that Congress intended to limit broader common law immunities otherwise applicable to PRO functions. If anything, petitioner's quotation from Senator Bennett, a sponsor of the 1972 bill that created Medicare PROs (then called Professional Standards Review Organizations), shows that he did not anticipate civil actions against PSROs.

> The amendment [creating PSROs] is so structured that practicing physicians rather than Government agencies or insurance company personnel will decide whether care was necessary and of proper quality. At the same time, I have built numerous safeguards into the amendment to assure public accountability and proper and professional monitoring of the review organizations.

118 Cong. Rec. 1017 (1972) (remarks of Sen. Bennett). While Senator Bennett (and presumably Congress as a whole) desired "public accountability and proper and professional monitoring" of PSROs, it is clear that accountability and monitoring were "built * * * into" the statute, with its many layers of appeals. It is at best a twisted interpretation to consider a private lawsuit (especially of the kind brought here as apparent retaliation) to be "proper and professional monitoring" of the work of an entity actively and extensively supervised by the Secretary of HHS.

REASONS FOR DENYING THE WRIT

The decision below meets none of the criteria for certiorari. There is certainly no split in the circuits. *Kwoun* and the decision in this case are the only decisions from any circuit even to discuss whether Medicare PROs are entitled to absolute immunity when they act as prosecutors in recommending sanctions.

Equally lacking is a conflict with the decisions of this Court, which have never addressed the immunity afforded Medicare PROs for any of their activities. Although petitioner cites three decisions of the Court, *Patrick* v. *Burget*, 486 U.S. 94 (1988), *Summit Health, Ltd.* v. *Pinhas*, 111 S. Ct. 1842 (1991), and *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 848 (1984), these decisions do not discuss federal actor immunity or Medicare PROs. Far from suggesting a conflict, these decisions do not, in any way, cast doubt on the decision of the court of appeals.

Finally, the existence of only two appellate decisions on the subject—although PROs have been in existence for nearly 20 years—demonstrates that the narrow question of statutory construction decided below does not merit review in this Court. Granting certiorari would, in any event, be a pointless exercise given petitioner's complete failure to provide substantial reasons for reversing the Seventh Circuit's decision.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioner's primary attempt to satisfy the criteria for certiorari is to assert that there is a conflict among the circuits. Pet. 6. This assertion borders on the frivolous. Neither case cited by petitioner as being "in conflict" deals with the prosecutorial function of PROs. Indeed,

neither case discusses the scope of immunity afforded PROs at all.

Petitioner first cites an unpublished decision of the Sixth Circuit, *Taylor* v. *Flint Osteopathic Hospital, Inc.*, No. 84-1206 (6th Cir. May 29, 1985) (LEXIS, Genfed library, USApp file).[8] In *Taylor*, plaintiff alleged that the PRO had denied his claims for Medicare reimbursement in a racially discriminatory manner and conspired with a hospital to deprive plaintiff of his staff privileges. The Sixth Circuit nowhere mentioned (and therefore did not analyze), the prosecutorial duties of PROs in recommending sanctions to HHS. There is no evidence anywhere in the Sixth Circuit's unpublished opinion that the court even considered whether the PRO was entitled to immunity of any kind.

Petitioner's claim of a conflict between the decision below and *Dozier* v. *Professional Foundation for Health Care, Inc.*, 944 F.2d 814 (11th Cir. 1991), is equally groundless. *Dozier* deals with a claim that the PRO "issued a notice of [Medicare] payment denial that contains a defamatory statement." *Id.* at 815. The Eleventh Circuit held that, because the PRO (and its executive director) had complied with the then-applicable statute and regulations in sending the notice, the plaintiff had failed to state a claim. *Id.* at 817-18. Like *Taylor*, *Dozier* discusses

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[8] Although the petition contains a citation to the Federal Reporter, 765 F.2d 146, the page cited merely lists the case as an unpublished opinion. Compounding his confusion, petitioner, in his Table of Authorities, apparently believes the Sixth Circuit to have reviewed a district court opinion reported at 561 F. Supp. 1153 (E.D. Mich. 1983). In fact, the Sixth Circuit explicitly stated that it was reviewing only a later (unpublished) district court decision granting defendants' summary judgment motion. *Taylor*, *supra*, LEXIS slip op. at 2.

neither the availability of immunity generally nor the prosecutorial function of PROs in recommending sanctions.

Petitioner's claim of a conflict is simply false. In reality, the Eighth Circuit's 1987 decision in *Kwoun* has stood unchallenged by any other authority in the five years that have passed. This Court denied certiorari in *Kwoun*, and plaintiff has shown no reason why certiorari should be granted now from the Seventh Circuit's unpublished Order following *Kwoun*.

II. THE SEVENTH CIRCUIT'S ORDER DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner's claim that the Seventh Circuit's decision conflicts with the decisions of this Court (Pet. 6) is also untenable. Plaintiff relies on *Patrick* v. *Burget*, 486 U.S. 94 (1988), and *Summit Health, Ltd.* v. *Pinhas*, 111 S. Ct. 1842 (1991). Neither case deals with Medicare PROs—nor with federally-created (and regulated) peer review organizations or with federal actors of any kind.

Rather than address the immunity available to federal actors, *Patrick* dealt with an entirely different type of immunity—the antitrust immunity afforded state action under *Parker* v. *Brown*, 317 U.S. 341 (1943). In *Patrick*, the Court held that the state action doctrine did not apply to the actions of a private hospital peer review committee in applying its own private standards. The Court had no reason to discuss Medicare PROs, and did not do so. The inapplicability of the state action doctrine to private unregulated conduct has no bearing here. This case involves an entirely different type of immunity. Moreover, it involves prosecutorial conduct that is mandated by a complex federal statutory scheme and subject to extensive administrative and judicial review.

Summit also involved a private hospital's own peer review process. The Court granted certiorari on a narrow jurisdictional question: whether defendants' conduct constituted interstate commerce under the Sherman Act. *See* 111 S. Ct. at 1844. The majority did note Congress' provision of limited immunity for *hospitals* whose peer review committees comply with the requirements of 42 U.S.C. § 11112. *Id.* at 1848 & n.12. Section 11112, however, has no application to Medicare PROs. *See* 42 U.S.C. § 11151 (4)(A) (defining "health care entit[ies]" protected by Section 11112). The Court thus had no occasion to discuss Medicare PROs, like CCFMC, that are authorized under 42 U.S.C. § 1320c *et seq.* Unsurprisingly, *Summit* does not discuss federal actor immunity or prosecutorial absolute immunity.

Finally, petitioner invokes *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 848 (1984), to argue that both the Seventh and Eighth Circuits ignored the "plain language" of Section 1320c-6(b), which provides that an employee of a PRO (or any person having a fiduciary relationship to a PRO) is immune from liability "provided he has exercised due care." *Chevron*, of course, states a very general principle of statutory construction. It dealt neither with immunity issues nor with Medicare PROs.

Ordinarily, this Court has not granted certiorari when the petitioner asserts only a conflict with general principles and fails to show a "real or 'intolerable' conflict on the *same matter of law or fact*, not merely an inconsistency in dicta or in general principles utilized." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.3, at 196 (6th ed. 1986) (emphasis added). The decisions of the Seventh Circuit below and the Eighth Circuit in *Kwoun* that the language of Section 1320c-6(b) does not compel the interpretation sought by petitioner hardly con-

stitutes the type of direct conflict necessary to justify certiorari.

Petitioner has failed to show a conflict for a more fundamental reason: the "plain language" doctrine provides no support for his construction. The "plain language" doctrine applies only if "the intent of Congress is clear." *Chevron*, 467 U.S. at 842. The doctrine requires that the courts "give effect to the *unambiguously* expressed intent of Congress." *Id.* at 843 (emphasis added). Where "the statute is silent or ambiguous with respect to the specific issue," the "plain language" doctrine does not apply. *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Congress has not "unambiguously expressed" an intention to deprive Medicare PROs of the common law absolute immunity afforded other federal actors who perform prosecutorial duties. The statute is silent as to those duties; it simply does not address the issue decided below.

Instead, as the Government argued in the Court of Appeals,

> The more plausible interpretation of [Section 1320c-6(b)] is that Congress meant to set a statutory floor on the immunity available to PROs and those participating in their activities. There is no reason to think that Congress meant for that floor to be a ceiling as well.

Brief for the United States as *Amicus Curiae* 12. The statute nowhere purports to limit other immunities or to create civil liability where none would otherwise exist. There is thus no conflict of any kind between the decision of the Court of Appeals and either the language of Section 1320c-6(b) or this Court's decisions.

III. PETITIONER HAS FAILED TO SHOW ANY OTHER BASIS FOR CERTIORARI.

In failing to make sustained arguments of any kind, the petition in this case falls far short of providing any other basis for granting certiorari. Justice Frankfurter long ago noted that review is inappropriate unless the petition presents "a problem beyond the academic or episodic." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Aside from the published district court and appellate opinions in *Kwoun*, there appear to be no other published opinions deciding whether Medicare PROs are protected by absolute immunity when they recommend sanctions. There has certainly been no groundswell of suits against Medicare PROs requiring the Court's attention.

Missing from the petition is one other essential element: a persuasive argument that the decision below was incorrect. Plaintiff does not deny that defendants acted in a prosecutorial capacity.[9] He fails to discuss, let alone dispute, the absolute immunity that federal common law affords federal actors in performing prosecutorial duties. *See, e.g., Butz* v. *Economou*, 438 U.S. 478, 508-17 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409, 421-24 (1976) (discussing historical growth of immunity); *Hampton* v. *City of Chicago*, 484 F.2d 602, 607-08 (7th Cir. 1973) (Stevens, J.), *cert. denied*, 415 U.S. 917 (1974). *Cf. Austin Municipal Securities, Inc.* v. *National Ass'n of Securities Dealers*, 757 F.2d 676, 689-92 (5th Cir. 1985) (disciplinary officers of private "self-regulatory organization" acted as pros-

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[9] *See Kwoun*, 811 F.2d at 408; *Doyle* v. *Secretary of HHS*, 848 F.2d 296, 302 (1st Cir. 1988) (Breyer, J.) ("PRO's dual role as prosecutor and judge"); *American Hospital Ass'n* v. *Bowen*, 834 F.2d 1037, 1048 (D.C. Cir. 1987) (PRO is "essentially an enforcement agent of the federal government").

ecutors entitled to absolute immunity); *Kissell* v. *Breskow*, 579 F.2d 425, 430 (7th Cir. 1978) (same).

Apart from ineffectually invoking the "plain language" rule, as discussed above, petitioner has not begun to show that Congress intended to permit suits based on sanctioning decisions. He has not explained why a statute that does not even mention a common law rule should be read to limit that rule. It is hornbook law that "[s]tatutes in derogation of the common law are not to be extended beyond their express terms." *Farish for Farish* v. *Courion Industries*, 754 F.2d 1111, 1115 (4th Cir. 1985). Accordingly, "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 501 (1986).[10] Neither the language nor the intent of the entire Medicare PRO statutory scheme, including Section 1320c-6(b)'s creation of statutory immunity for *all* PRO activities, hints at a statutory mandate to eliminate additional common law immunities applicable to specific activities.

Petitioner has not even identified public policy considerations from which it could be inferred that Congress intended to permit damage suits against Medicare PROs. While Congress intended that PROs be accountable for

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[10] We note that, after enactment of Section 1320c-6(b) in 1972, Congress has twice amended that subsection without limiting the availability of absolute immunity. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4205(f), 104 Stat. 1388, 1388-114 (explicitly extending protection to PROs; statutory immunity was previously available only to employees and fiduciaries); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 143, 96 Stat. 389 (eliminating proviso that defendant be "motivated by malice"). The 1990 revision occurred after the Eighth Circuit published its decision in *Kwoun*.

their actions, Congress mandated the elaborate appeals procedure detailed *supra* to ensure that any errors by PROs would receive thorough scrutiny.[11] But Congress did not intend potentially to destroy the viability of the sanctioning process by subjecting PROs and their participating reviewers to retaliatory suits. As the Court recognized in *Butz* v. *Economou*, a case expanding the availability of prosecutorial absolute immunity,

> there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts.

438 U.S. at 515. Absent explicit pronouncement to the contrary, Congress cannot be supposed to have encouraged litigation that would deter physicians from participating in peer reviews or from recommending sanctions should they participate.

In all respects, whether in attempting to meet the criteria for certiorari or in showing that the Seventh Circuit erred, the petition in this case is an exercise in futility. It should be denied.

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[11] Congress also empowered the Secretary of HHS to revoke the contract of a PRO that "has failed substantially to carry out the contract or is carrying out the contract in a manner inconsistent with the efficient and effective administration of [the peer review system]." 42 U.S.C. § 1320c-2(c)(6)(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PRISCILLA P. WEAVER
Counsel of Record
KENNETH E. WILE
JAMES R. MAC AYEAL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

FRANK N. GUNDLACH
Armstrong, Teasdale,
Schlafly, Davis & Dicus
One Metropolitan Square
St. Louis, Missouri 63102
(314) 621-5070

Attorneys for Respondents
Crescent Counties Foundation
for Medical Care and Thomas
R. Hyngstrom

JUNE 1992

APPENDIX

EXCERPTS FROM PETITIONER'S SECOND AMENDED COMPLAINT

COUNT I

SHERMAN AND CLAYTON ACTS VIOLATION COUNT:

* * * * *

7. 122 ALLEGATIONS OF MEDICAL PRACTICE MISCONDUCT BY PLAINTIFF,

111 WERE DISMISSED BY NON AREA PHYSICIAN ET AL REVIEWERS,

11 REMAIN SOLELY BECAUSE OF FRAUDULENT COMMUNICATIONS TO OIG BY DEFENDANT(S),

ST LOUIS ALJ ASSIGNED BY OIG TO HOLD DE NOVO HEARING ON 11 REMAINING ALLEGATIONS:

* * * * *

(2) OIG FRAUDULENTLY CONTACTED TO KEEP 11 ALLEGATIONS ALIVE:

One or more OIG Personnel were falsely advised by Defendant Freedman, MD and/or Hyngstrom, PhD, et al that Allegations must remain as substantiated because a One Year Sanction, which implied an admission by Dr. Wood of Medical Practice Misconduct, and although the OIG had read on and dismissed half of the 22 Allegations, the OIG left half in order to sanction the Plaintiff for 1 year (reduced from 5 years because of Review by Peer Reviewers of the 44 reported Allegations to CCFMC) even though the Plaintiff had 3 times on the last Record denied that he had done anything wrong and was not guilty of any Allegation of Medical Practice Misconduct and had 3 times refused a compromise offer of 1 year sanctioning on the Second Sanction Trial Record; and/or

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COUNT III

COMMON LAW NEGLIGENCE COUNT

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(3) MULTIPLE DENIALS OF DUE PROCESS PERMITTED:

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[1] STAR CHAMBER INQUISITIONING PROCEEDINGS OVER OBJECTIONS: Permitting a Star Chamber Inquisitorial Proceeding to be conducted by Seven Physicians at the First Sanctioning Trial over Objection by Plaintiff's Attorneys (with multiple objections never ruled on but "deferred") with Defendant West, JD voluntarily summarizing JD Objections with "You mean a Kangaroo Court?" and Boyarsky, JD-MD on the Record some pages later volunteering "Why, this is nothing but a Star Champer Proceeding", at the March 31, 1986 First Sanctioning Trial) by Negligently and Carlessly:

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COUNT V

WILFUL AND WANTON MISCONDUCT &/or IN FRAUD &/or IN CONSPIRACY &/or "MANIFEST & PALPABLE"

* * * * *

8. DEFENDANTS WILFUL & WANTON MISCONDUCT &/OR IN FRAUD &/OR IN CONSPIRACY &/OR IN BAD FAITH &/OR MALICIOUSLY &/OR "MANIFEST AND PALPABLE" CHARGE:

* * * * *

(4) THE BAD MEDICINE CHARGES:

By Willfully and Wantonly et al Misrepresenting the correct dosages and range of correct dosages and usages of numerous medications which were reported and charged as being used improperly when they were actually being used properly (according to the Physicians Desk Reference (PDR 1984-1987), Conns Treatment, Merck Manual, et al, all standard Medical Texts and Current Medical Literature, etc) as documented in the Replies and Reports submitted by Plaintiff.